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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS JACKSON,

Defendant and Appellant.

H046139, H046413
(Monterey County
Super. Ct. No. SS161816A)

Defendant Thomas Jackson pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11378)¹ and admitted that he had a prior drug conviction (former § 11370.2, subd. (c)). In January 2017, the trial court imposed a split sentence of six years with the execution of the last four years suspended and made a period of mandatory supervision. Defendant did not appeal the judgment. In May 2018, after admitting that he violated the terms of his mandatory supervision, defendant filed a motion to modify his sentence under Senate Bill No. 180. Senate Bill No. 180, which became effective January 1, 2018, amended section 11370.2 by limiting sentencing enhancements to prior convictions that, unlike defendant's, involved using a minor to commit drug-related crimes. (Stats. 2017, ch. 677, § 1.) Defendant's motion was denied. Later, his mandatory supervision was revoked.

¹ Unspecified statutory references are to the Health and Safety Code.

Defendant appeals from the trial court's order denying his motion to modify his sentence and the order revoking mandatory supervision.² He argues that Senate Bill No. 180 retroactively applies to him. As we explain, we disagree. Although Senate Bill No. 180 applies to nonfinal judgments, defendant's judgment was final when the legislation took effect. We affirm both orders.

BACKGROUND

On December 20, 2016, an information was filed charging defendant with possession for sale of a controlled substance (methamphetamine) (§ 11378; count 1), transportation of a controlled substance (methamphetamine) (§ 11379, subd. (a); count 2), possession for sale of a controlled substance (heroin) (§ 11351; count 3), and sale, transportation, or offer to sell a controlled substance (heroin) (§ 11352, subd. (a); count 4). It was alleged as to each count that defendant had prior drug convictions (former § 11370.2, subds. (a), (c)). It was further alleged that defendant had served a prior prison term pursuant to Penal Code section 667.5, subdivision (b).

On December 21, 2016, defendant pleaded no contest to count 1 and admitted a prior drug conviction enhancement under former section 11370.2, subdivision (c).

On January 13, 2017, the trial court imposed a split sentence of six years, composed of three years for count 1 and three years for the enhancement under former section 11370.2, subdivision (c) with the execution of the last four years suspended and made a period of mandatory supervision. Defendant did not appeal from his sentence.

On April 18, 2018, defendant admitted that he violated the terms of his mandatory supervision. On May 22, 2018, defendant filed a motion for modification of his sentence under Senate Bill No. 180. Defendant argued that under Senate Bill No. 180, the prior

² In case No. H046413, defendant appeals from the order revoking his mandatory supervision. In case No. H046139, defendant appeals from the order denying his motion for modification of mandatory supervision. We ordered these two cases considered together.

drug conviction enhancement under former section 11370.2, subdivision (c) no longer applied to his case. On June 29, 2018, the trial court denied defendant's motion.

On July 10, 2018, the probation department filed a petition alleging that defendant had violated the terms of his mandatory supervision. On August 14, 2018, the district attorney's office filed a declaration alleging that defendant had committed violations of sections 11364, subdivision (a) and 11377, subdivision (a).³

On October 12, 2018, the trial court revoked defendant's mandatory supervision. The trial court ordered the previously suspended sentence to be executed and ordered defendant to serve the balance of his six-year term in jail.

DISCUSSION

Defendant's sole contention on appeal is that his prior drug conviction enhancement must be stricken because Senate Bill No. 180, which became effective January 1, 2018, applies retroactively to him. Defendant argues that because the trial court retained the discretion to modify the terms of his mandatory supervision (Pen. Code, §§ 1170, subd. (h), 1203.2, 1203.3), his judgment was not yet final when Senate Bill No. 180 took effect. The People agree that Senate Bill No. 180 applies to nonfinal judgments but argue that defendant is not entitled to relief because the judgment against him became final before Senate Bill No. 180's effective date.

Effective January 1, 2018, Senate Bill No. 180 limited the scope of section 11370.2 enhancements to those prior convictions for sales of narcotics involving a minor in violation of section 11380. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213, review granted Nov. 20, 2018, S251333 (*McKenzie*); Stats. 2017, ch. 677, § 1.) Accordingly, Senate Bill No. 180 eliminated the former section 11370.2, subdivision (c) enhancement that was imposed in defendant's case. Senate Bill No. 180 applies

³ According to the minute order and the transcript of the hearing held on August 17, 2018, defendant denied that he violated the terms of his mandatory supervision based on the allegations in the petition filed on July 10, 2018.

retroactively to all judgments that were not final on January 1, 2018. (See *McKenzie*, *supra*, at p. 1213; *People v. Grzymski* (2018) 28 Cal.App.5th 799, 805, review granted Feb. 13, 2019, S252911 (*Grzymski*); *People v. Millan* (2018) 20 Cal.App.5th 450, 455-456; *In re Estrada* (1965) 63 Cal.2d 740, 742-748 [absent evidence to the contrary, courts must assume that ameliorative criminal laws that reduce punishment for a particular criminal offense apply to all defendants whose judgments are not yet final at the statute's operative date].)

The issue is whether defendant's judgment was final when Senate Bill No. 180 took effect. Here, defendant's split sentence was authorized under Penal Code section 1170, subdivision (h)(5). Under this statute, trial courts " 'have [the] discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision.' " (*People v. Camp* (2015) 233 Cal.App.4th 461, 467 (*Camp*).) When imposing a split sentence, the trial court imposes a sentence on the defendant but "suspend[s] execution of a concluding portion of the term for a period selected at the court's discretion." (Pen. Code, § 1170, subd. (h)(5)(A).) "The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of [Penal Code] Section 1203.2 or Section 1203.3." (*Id.*, subd. (h)(5)(B).)

Under section Penal Code section 1203.2, subdivision (b)(1), the court may, on the motion of the supervised person, "revoke, or terminate supervision of the person pursuant to his subdivision" And under Penal Code section 1203.3, subdivision (a), the court has the authority "at any time during the term of [mandatory supervision] to revoke, modify, or change its order of suspension of imposition or execution of sentence."

Thus, defendant contends that his split sentence was not final when Senate Bill No. 180 took effect because it remained subject to modification by the trial court.

The First Appellate District considered this identical issue in *Grzymski* and concluded that an unappealed split sentence becomes final for the purposes of *Estrada* 60 days after it was imposed. (*Grzymski, supra*, 28 Cal.App.5th at p. 802, rev. granted.) In *Grzymski*, the appellate court determined that the defendant, who was sentenced to split sentences in 2013 and 2015, was not entitled to relief under Senate Bill No. 180 because his sentences were final when the legislation took effect. (*Id.* at pp. 803, 806.)

Grzymski analogized split sentences to orders of probation, which can also be modified under Penal Code sections 1203.2 and 1203.3. (*Grzymski, supra*, 28 Cal.App.5th at p. 807, rev. granted.) *Grzymski* observed that it is settled that unappealed orders of probation are final after 60 days, notwithstanding the fact that they may be modified in the future. (*Ibid.*) *Grzymski* further acknowledged that there may be a distinction between probation orders and orders imposing split sentences because a trial court that imposes a split sentence can later change the overall length of the sentence whereas a trial court that imposes a sentence following a probation revocation cannot. (*Id.* at pp. 807-808, citing *Camp, supra*, 233 Cal.App.4th 461.) Nonetheless, *Grzymski* held that “[e]ven assuming that in this sense a split sentence is ‘less final’ than a probation order suspending execution of the sentence, we are unable to conclude that such sentences are not final judgments merely because they are subject to modification.” (*Grzymski, supra*, at p. 808.)

We find *Grzymski* persuasive. In a criminal case, the sentence *is* the judgment. (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625; *McKenzie, supra*, 25 Cal.App.5th at pp. 1213-1214, rev. granted.) Defendant was sentenced on January 13, 2017, to a split sentence that included a term of mandatory supervision. He did not appeal from this

sentence, and, as a result, the judgment against him became final long before Senate Bill No. 180 took effect on January 1, 2018.

Defendant claims that *Grzymski* is “fatally premised on several erroneous assumptions” and argues that it was wrongly decided. First, defendant claims that *Grzymski* failed to distinguish that Penal Code section 1203.2, subdivision (c) divests the trial court from revisiting sentences in probation cases but *not* in split sentence cases. As we have discussed, *Grzymski* addressed this issue and determined that even if this distinction renders a split sentence “ ‘less final’ ” than a probation order, it was unable to conclude that the split sentence was not a final judgment for the purposes of *Estrada*. (*Grzymski*, *supra*, 28 Cal.App.5th at p. 808, rev. granted.)

Second, defendant argues that *Grzymski* erroneously concluded that the trial court’s ability to recall a sentence imposed under Penal Code section 1170, subdivision (h) within 120 days (Pen. Code, § 1170, subd. (d)(1)) does not affect the finality of the judgment. (*Grzymski*, *supra*, 28 Cal.App.5th at p. 807, rev. granted [“the possibility that a sentence may be recalled does not affect its finality”].) Defendant argues that *Grzymski* does not cite to any authority for this principle. Defendant, however, does not cite to any contrary authority. Moreover, the finality of judgments that are subject to recall by the trial court is not the issue that is before us.

Lastly, defendant contends that following its decision in *Grzymski*, the First Appellate District has since ordered defendants to be resentenced under newly enacted legislation, citing *People v. Morrison* (2019) 34 Cal.App.5th 217. The defendant in *Morrison* was sentenced in September 2017 and petitioned for recall of his sentence under Penal Code section 1170, subdivision (d)(1) in December 2017 seeking relief under Senate Bill No. 620 (giving trial courts the discretion to strike firearm enhancements), which became effective January 1, 2018. (*Morrison*, *supra*, at p. 220.)

Morrison, however, did not analyze whether the defendant's judgment was final for the purposes of retroactivity under *Estrada* and is inapplicable to defendant's case.

Defendant also argues that applying Senate Bill No. 180 to his case comports with the bill's legislative intent to reduce the prison population, address racial inequity, and alleviate state and local budgets. The Legislature, however, chose not to make Senate Bill No. 180 fully retroactive, and we need not "interpret [a] statute in every way that might maximize" its purpose. (*People v. Morales* (2016) 63 Cal.4th 399, 408.) Senate Bill No. 180 already fulfills its legislative purpose by applying prospectively to all future cases and retroactively to all nonfinal judgments.

DISPOSITION

In case No. H046413, the order revoking mandatory supervision is affirmed.

In case No. H046139, the order denying defendant's motion for modification of mandatory supervision is affirmed.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.